No. 75-1373

# In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN EXABA IRVING, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*

RICHARD L. THORNBURGH,
*Assistant Attorney General,*

MICHAEL W. FARRELL,
ROGER A. WAY, JR.,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-1373

JOHN EXABA IRVING, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 18-23) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on January 19, 1976. A petition for rehearing was denied on February 25, 1976 (Pet. App. 37). The petition for a writ of certiorari was filed on March 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the concurrent sentence doctrine should be abandoned.

2. If not, whether the court of appeals properly invoked the doctrine in the circumstances of this case.

## STATEMENT

1. Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and of distribution of heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment, with immediate parole eligibility pursuant to 18 U.S.C. 4208(a)(2) (Pet. App. 24).[1] The court of appeals affirmed.

In the latter part of 1973, Park M. Kaestner, a Kansas City Police officer working in an undercover capacity, purchased heroin on three occasions from Larry Ray Thompson (Tr. 18, 21-25).[2] Thompson subsequently introduced Kaestner to Patricia Ponds, whom he identified as his source; on that occasion Thompson and Ponds sold Kaestner an ounce of heroin (Tr. 26-30). Approximately a week later, Kaestner purchased two capsules of heroin from Ponds (Tr. 59-61).

On January 28, 1974, Kaestner met Ponds in a motel room. Kaestner refused to purchase an ounce of heroin from Ponds unless he could meet her source. Ponds made a telephone call, explained the problem to the other party, and handed the receiver to Kaestner. Kaestner told the "gentleman" that he would not purchase any

---

[1]The district court apparently neglected to impose the terms of special parole required by 21 U.S.C. 841(b).

[2]The indictment charged six persons with conspiracy and substantive counts of unlawful distribution. Patricia Ponds and Anthony Minnis, who were tried with petitioner, were convicted on all counts on which they were charged. Larry Ray Thompson pleaded guilty to one substantive count prior to trial and testified on behalf of Ponds. Peter Calvin Jones and Elizabeth Smallwood were fugitives at the time of trial.



more heroin from Ponds because of the inferior quality of the drugs she had previously supplied (Tr. 74).[3] The other person told Kaestner that he would "be by" after he had attended a boxing match. Subsequently petitioner, whom Ponds introduced to Kaestner as "X", arrived at the motel room and gave Kaestner his choice of the ounce of heroin that Ponds earlier had offered him or two ounces that petitioner had brought with him. Kaestner paid petitioner $1,200 for one of his ounces. Petitioner then picked up the remaining heroin and left the room (Tr. 73-78).

Over a month later, Kaestner again met Ponds in Witchita and was introduced to Peter Calvin Jones and Anthony Minnis. He negotiated with them the purchase of an ounce of heroin and received a small sample. Kaestner then met with Elizabeth Smallwood and purchased the ounce of heroin from her for $1,250 (Tr. 82-90).

The court of appeals, noting that petitioner had received concurrent sentences for his conspiracy and substantive convictions, considered and rejected petitioner's challenges to the validity of his conviction for unlawful distribution and declined to decide the merits of his conspiracy conviction. It wrote: "the court's affirmance of conviction of [the distribution] count precludes the necessity of review of the count of conspiracy, since reversal of that count would not alter the sentence imposed, nor cause any adverse consequences" (Pet. App. 23).

---

[3]Kaestner testified over objection that his experience indicated that a purchase of a large amount of heroin tended to be of a higher quality than small purchases, which were usually diluted to a "street level." He testified that the substance purchased from Ponds was only one and one-half to two percent heroin, whereas the substance that he later purchased from petitioner was 14 percent heroin (Tr. 53-58, 222-224).

## ARGUMENT

Petitioner contends that there is a conflict among the circuits as to the validity of the concurrent sentence rule and that, at least in cases where infirmities in a conspiracy conviction might also invalidate an underlying substantive conviction, the rule is inconsistent with this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750. Neither of these contentions is substantial.

1. The concurrent sentence doctrine was first enunciated by Chief Justice Marshall in *Locke* v. *United States*, 7 Cranch 339, 344. It has been an accepted part of our jurisprudence ever since. See, *e.g.*, *Snyder* v. *United States*, 112 U.S. 216, 217; *Claassen* v. *United States*, 142 U.S. 140; *Hirabayashi* v. *United States*, 320 U.S. 81, 105. It rests upon the understanding that a concurrent sentence creates few, if any, collateral consequences in addition to those properly attributable to the sentence that has been considered and upheld by the appellate court.[4]

In *Benton* v. *Maryland*, 395 U.S. 784, 788-791, this Court held that there is no jurisdictional bar (stemming from the constitutional requirement of justiciability) to review by an appellate court of all convictions for which concurrent sentences have been imposed. The Court recognized, however, that "as a rule of judicial convenience" a reviewing court may in its discretion decline to

[4]For example, the United States Parole Commission treats multiple convictions with concurrent sentences as a single offense. See 41 Fed. Reg. 19333, amending 28 C.F.R. 2.20. In computing offense severity for use as part of its release guideline program, the Commission considers the most serious offense for which a sentence has been imposed and ignores less serious or equally serious offenses for which the offender is serving concurrent sentences. Thus where, as here, an offender's crimes are equally serious, the concurrent but unreviewed conviction has no effect on parole consideration.



consider issues relevant to other counts after affirming a conviction for which a concurrent sentence was imposed. In *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16, the Court again recognized the validity of the concurrent sentence rule as one of judicial convenience, declining "as a discretionary matter" to reach issues pertaining to other counts that carried concurrent sentences after affirming convictions on two counts.[5]

In the wake of *Benton*, the Seventh Circuit has adopted a rule of practice that unless "there [is] no possibility of undesirable collateral consequences," it will consider the validity of convictions on all challenged counts, even those carrying concurrent sentences. *United States* v. *Tanner*, 471 F.2d 128 (C.A. 7), certiorari denied, 409 U.S. 949; *Crovedi* v. *United States*, 517 F.2d 541 (C.A. 7). But, in keeping with *Benton*, the same court has emphasized that this practice was adopted purely "in the exercise of its discretion" and that, in any given case, it "need not have reached these issues." *United States* v. *McLeod*, 493 F.2d 1186, 1189 and n. 1. Thus the Seventh Circuit is simply utilizing its discretion under the rule in a particular manner; it has not denied that it possesses discretion.

Other circuits have used the discretion to resolve some claims and pretermit others. The Eighth Circuit, for example, has "question[ed] the efficacy of the * * * rule" in some circumstances (*United States* v. *Belt*, 516 F.2d 873, 876 (C.A. 8), certiorari denied, No. 75-5362, January 12, 1976), but has employed it in other cases. See *United States* v. *Wilson*, 497 F.2d 602,

[5]On the other hand, in *United States* v. *Maze*, 414 U.S. 395, 397 n. 1 the Court found "appropriate" the decision of the lower court to consider "the mail fraud convictions [presented by this case]" even after affirming the defendant's Dyer Act conviction carrying an identical concurrent sentence.

605 n. 4 (C.A. 8), certiorari denied, 419 U.S. 1069; *United States* v. *Simone*, 495 F.2d 752, 753-754 (C.A. 8).[6]

Moreover, even if petitioner is correct that, in determining whether to apply the concurrent sentence rule in a given case, some circuits appear to give greater weight than do others to the possible adverse collateral effects of convictions, that is no reason for this Court to establish an inflexible rule. There is no disagreement among the circuits on the principle that application of the concurrent sentence rule is appropriately entrusted to the discretion of the particular reviewing court; such differences in emphasis as may exist among the circuits in deciding when to employ the doctrine are the inevitable consequence of the broad discretion with which the courts are endowed in this regard.

2. Petitioner urges, however, that the court of appeals erred in refusing to consider the validity of his conspiracy conviction in this case because the "spillover" of evidence relating to conspiracies of which he was not a part affected the substantive conviction (Pet. 14-17). See *Kotteakos* v. *United States*, 328 U.S. 750. But the substantive count on which petitioner was convicted involved a sale of heroin in which petitioner was a direct participant. There is, therefore, no basis for assuming that the jury relied on evidence of his participation in the conspiracy to convict him on the substantive count.

The sale of heroin underlying petitioner's substantive conviction was a discrete event, separated chronologically from the other sales testified to by Kaestner. It presented the jury with a relatively simple issue: whether to believe

[6]Compare *United States* v. *Maze*, 468 F.2d 529 (C.A. 6), affirmed, 414 U.S. 395 (resolving claim), with *Ethridge* v. *United States*, 494 F.2d 351 (C.A. 6), certiorari denied, 419 U.S. 1025 (invoking concurrent sentence rule).



Kaestner or petitioner and his associate Ponds (both of whom testified) concerning the events that occurred on January 28. Even assuming, therefore, that the evidence showed the existence of multiple conspiracies rather than the single one alleged, there is no significant danger that evidence of the guilt of other defendants who were not present on January 28 was used by the jury to convict petitioner of the sale on that occasion. See *United States* v. *Miley*, 513 F.2d 1191, 1208-1209 (C.A. 2); *United States* v. *Johnson*, 515 F.2d 730, 733 n. 8, 736 (C.A. 7).[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

RICHARD L. THORNBURGH,
*Assistant Attorney General.*

MICHAEL W. FARRELL,
ROGER A. WAY, JR.,
*Attorneys.*

JUNE 1976.

[7]In the court of appeals, petitioner argued that he was prejudiced as to both the conspiracy and substantive counts by Kaestner's testimony comparing the purity of the heroin he had received from Ponds and petitioner, because this testimony arguably implied that petitioner was a dealer in large quantities of heroin (see note 3, *supra*; Pet. App. 20). But whether or not this testimony was relevant to the conspiracy count, it was independently admissible under the substantive count to explain Kaestner's testimony that he refused to buy heroin from Ponds until he was assured by her source that he would receive better quality drugs.